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In the Supreme Court of the United States

OCTOBER TERM, 1997

ANTOINE M. SAACKS, JR.,
Petitioner,

v.

CITY OF NEW ORLEANS, NEW ORLEANS POLICE DEPARTMENT, AND JOSEPH ORTICKE IN HIS CAPACITY AS CHIEF OF POLICE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT AND THE COURT OF APPEAL, FOURTH CIRCUIT, STATE OF LOUISIANA

APPENDIX VOLUME II

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ANTOINE SAACKS	*	NEW ORLEANS CITY
	*	CIVIL SERVICE
VERSUS	*	
	*	
DEPARTMENT OF POLICE	*	CASE NO. 4890

REPORT OF THE HEARING EXAMINER

This case was scheduled and came on for hearing on December 8, 1994, in Room 7W03, City Hall. Ike Spears and Sonja Spears, Attorneys at Law, were present and representing the Department of Police (hereafter "NOPD"), along with NOPD representative, former Chief Joseph Orticke. The Appellant Saacks was present and represented by his attorneys, Robert Harvey, Sr. and Tamara Jacobson. Various motions and procedural matters were addressed that day. Testimony also began that day and continued on various dates in December, January, February and concluded on March 1, 1995. The parties were given until March 31, 1995, to submit a Post-Trial Memorandum. This date was extended to April 7, 1995 at the request of counsel for NOPD. The parties have submitted their Post - Trial Memoranda with supporting exhibits and citations from the transcript, which the Hearing Examiner has read and considered along with his extensive notes.

FACTS

Antoine Saacks served as a member of the New Orleans Police Department for 26 years. He was first hired as a police recruit in 1967 and obtained permanent status the following year as a Patrolman. Mr. Saacks rose through the ranks. He made Detective in 1968 or 1969. He attained the ranks of Sergeant in 1974, Lieutenant in 1982, Captain in 1989. Ultimately he was named Deputy Chief by then Mayor Sidney Barthelemy in 1989. Mr. Saacks has served as Chief of

Detectives. Antoine Saacks also gained fame for his heroism during the Howard Johnson Hotel sniper crisis in January 1973. Ten or more police officers and civilians had already been killed and a number of persons wounded, when Officer Saacks volunteered to go up in a helicopter in an effort to kill the sniper, Mark Essex. P.O. Saacks was not the only person in the helicopter risking his life to kill this madman, but Mr. Saacks' marksmanship is widely credited with stopping the gunman. Ironically the City of New Orleans and NOPD chose not to award any commendations to Mr. Saacks or the others who could have easily died by sniper fire. However, Mr. Saacks was awarded a commendation by the U.S. Marines, the branch of the armed forces he served from 1965 to 1972. See Appellant Exhibit 46, in globo, which includes Commanding Officer C.H. Pitman's of the U.S. Marine Corps Honorary Aircrewman designation to Officer Saacks dated February 7, 1973. Also, see Antoine Saacks' Honorable Discharge from the marines.

It also should be noted that while working full time for NOPD, Mr. Saacks attended Tulane University, earning a Bachelor of Arts degree in 1975, with an "A" average. Mr. Saacks also attended the FBI Academy in Quantico, Virginia in 1977 for 3 months, successfully completing advanced police training. Further, Mr. Saacks completed Ed Renwicks' prominent Institute of Politics in 1993, and Mr. Saacks has attended various other seminars to further is police expertise, i.e. Bomb Investigators training at the Louisiana State Police Academy.

Equally impressive is a reading of the specifics on the many Letters of Commendation Deputy Chief Saacks received during his career from Superintendent of Police Joseph Giarrusso, Clarence Giarrusso and Henry Morris, The Commendations are too numerous to mention all. Some examples include:

On January 9, 1974, Chief Clarence Giarrusso wrote: "Case No, 2857 - You are commended for the outstanding example of police work displayed in the solving of an armed robbery and murder at the YMCA. Long hours of dedication and constant stakeouts resulted in the arrest of four subjects, the clearing of fifteen armed robberies, a murder and an escape from Angola."

On June 29, 1973, Chief Clarence Giarrusso wrote: "Case No. 2791 and 2792 - You are commended for your consistent, outstanding productivity for the months of March and April, 1973. In March you were responsible for the arrest of 24 subjects for armed robbery which resulted in the clearing of fifteen cases. In April you were responsible for the arrest of 16 subjects which resulted in the clearing of 24 incidents."

On February 19, 1975, Chief Clarence Giarrusso wrote: "Case No. 2998 - You are commended for your tireless devotion to duty and your innovative thinking in developing a plan that would renew interest in the Burglary Unit ..... Statistics are indicative of the progress made since this new system was placed into full operation."

On September 20, 1977, Sergeant Saacks received a commendation from Chief C. Giarrusso for his participation in a hostage crisis at the Maison Blanche Building. Sergeant Saacks eventually persuaded the subject to release his hostage, a doctor, and surrender.

On January 14, 1976, Sergeant Saacks received a commendation for outstanding example of diligence, efficiency and devotion to duty in apprehending an armed bandit who robbed the proprietor of a restaurant where Sgt. Saacks was eating with 2 other officers. A chase and shootout ensued and the robber ultimately was killed. This subject was

positively identified as the perpetrator of this armed robbery and three other armed robberies.

On January 16, 1985, Lt. Saacks was commended by Chief Morris for his apprehension of a mental patient 150 feet above the ground while standing on a 12 inch wide gang walk with no guard rails shared with 2 other officers.

See Appellant's Exhibit 46 in globo.

Consequently, Mr. Saacks became over the years one of the most recognizable and respected members of NOPD. He was recommended by various prominent citizens to Mayor Barthelemy for the job of Chief of Police, a job that went instead to former Chief Arnesta Taylor. However, as stated previously, Captain Saacks was named Assistant Superintendent/Deputy Chief to serve under Chief Taylor. There is ample, credible evidence that Mr. Saacks was the best Deputy Chief the force had seen in years. There was testimony from very knowledgeable witnesses that Mr. Saacks was the best prepared Deputy Chief on such important topics as budget matters. See the testimony of Major Howard Robertson at page 72, and the testimony of Deputy Chief Stephen Rodriguez. Deputy Chief Saacks was actively involved at all high level staff meetings as well as being Chief of Detectives.

In addition to his duties as a police Captain and Deputy Chief, it was widely known throughout the department that Mr. Saacks had a private police detail business, along with a partner Lt. L.J. Canal. Mr. Saacks and Lt. Canal called their private detail company Police Security Detail, Inc. (hereafter PSD) and specialized in serving the growing movie making industry. Private police detail work existed extensively in various forms throughout the entire force as a means of supplementing police officers' low pay. For example P.O. George Saberre testified that when he works his regular shift

for NOPD as a tow truck driver, he makes less than $6.00 per hour, but when he worked on a private movie detail for Police Security Detail, he made $14 per hour or more. He was delighted to make such good money on his off hours to help support his family of seven. Other prominent members of NOPD besides Chief Deputy Saacks coordinated details, such as Arthur "Pops" Bertucci, Lt. Sam Fradella, and Major Ronald Serpas.

Further, sometime in the late 1980's or early 1990's, Deputy Chief Saacks began considering his future with NOPD and the possibility of retiring and starting a new career. Antoine Saacks was still a relatively young man with time for a second career. Mr. Saacks became interested in the possibilities for a career in the video poker and or gaming industry, if it was finally legalized by the Louisiana Legislature. As time went on it became more and more clear to those who were following the political process surrounding video poker that it would eventually pass. It became common knowledge to people such as Chief Taylor, other Deputy Chiefs and Mayor Barthelemy that Mr. Saacks was actively interested in the video poker industry and had developed contacts with people who were already in the business in other states where it was legal. See testimony of Capt. Aschebrock at p. 150 and former Deputy Chief Stephen Rodriguez at p. 39 - 40. Chief Taylor would joke about Mr. Saacks possible lucrative future in video poker at staff meetings. See testimony of Major Howard Robertson at pages 67 - 68 and 74. Mayor Barthelemy and his administration actively desired video poker to be passed as a source of tax revenue. Mayor Barthelemy tacitly, if not expressly, gave his blessing to Mr. Saacks to lobby for video poker in Baton Rouge. See Saacks at p. 314 and Barthelemy at pp. 31 - 32 and 74. Deputy Chief Saacks, as part of his police duties, lobbied for various law enforcement measures before the Louisiana Legislature. There was no evidence that Mr. Saacks spoke before the Legislature or one of its

committees on behalf of video poker. Deputy Chief Saacks was seen in the company of lobbyists for video poker, while on some of his trips to Baton Rouge. See Deposition of Lt. Sam Fradella.

Likewise, during his rise through the ranks Mr. Saacks made a few enemies and or stepped on some toes. One enemy in particular was and is Anthony Radosti, who was assigned to the District Attorneys Office when he resigned from NOPD. There were various credible witnesses throughout the hearing who testified as to Mr. Radosti's vendetta against Mr. Saacks. See the testimony of P.O. John Riviere, a 25 year veteran who worked with Mr. Radosti for 10 years. Also see the testimony of Sgt. Ronald Cannatella. Mr. Radosti eventually became involved in and or helped found the independent police watchdog organization, The Metropolitan Crime Commission (hereafter the "MCC").

In July 1990 Mr. Saacks was introduced to officials from a large video poker company, United Gaming, Inc. (hereafter "UGI"), headquartered out of Las Vegas, Nevada. A dinner at Ruth's Chris Steakhouse was arranged that included, among others, Mr. Saacks, his close friend and neighbor, Attorney Mark Caracci, Mark Caracci's father, businessman Frank Caracci, Mississippi video poker operator Fernando Couquet and UGI officials Robert Woodson, Bob Horn and Bob Farinella. At this dinner meeting the possibilities of UGI doing business in Louisiana was discussed. Frank Caracci had expertise in route sales to alcoholic beverage outlets (hereafter "ABO's"), which could be very useful to UGI in establishing itself in the Louisiana market.

Frank Caracci has two (2) convictions in Federal Court dating back to the early 1970's. One conviction is for attempting to bribe an IRS agent and the other involved transporting pinball machines across state lines. Mr. Caracci served approximately 9 months for these offenses and has been a free man ever since. Apparently he has been

investigated and possibly charged with other violations since, but has no other convictions. Frank Caracci is labeled on his "rap sheet" as a possible career criminal. The Hearing Examiner found Frank Caracci a refreshingly candid witness. Mr. Caracci received a pardon from Governor Edwards for his two convictions in the early 1970's. The Hearing Examiner believes that due to a clerical error one of the counts of one of these convictions was not included in the pardon. However the exact same statute numbers that appear on conviction records also appear on the pardon. See the testimony of Sheri Morris at page 66.

The record is inconclusive as to when Mr. Saacks learned of Mr. Caracci's convictions. The Hearing Examiner believes that Mr. Caracci's record was not discussed openly at the dinner meeting at Ruth's Chris Steakhouse. See the testimony of Frank Caracci at page 74. As Mark Caracci testified at page 14, this is simply not something one would bring up at such at time. The testimony of Robert Woodson of UGI that Mr. Caracci discussed his convictions at dinner is contradicted by Woodson's own letter to William Bible of the Nevada State Gaming Control Board dated September 21, 1992. Further, the Hearing Examiner finds credible the testimony of Mr. Saacks at page 61, Mr. Frank Caracci at p. 52 and Mark Caracci at p. 11 that the Caraccis never advised Mr. Saacks of Frank Caracci's convictions and pardons prior to this case.

Subsequent to this dinner Antoine Saacks traveled to Las Vegas with Frank Caracci and others on two occasions to meet with UGI officials to pursue the possibility of doing business in Louisiana. Mark Caracci was unable to go on one trip because his multiple sclerosis was bothering him. At some point in time UGI learned of Frank Caracci's prior convictions and decided not to pursue any business dealings with him and further changed its focus from ABO's to doing a deal at the Fairgrounds.

Mr. Saacks was still a viable business partner to UGI, as a deal with Mr. Saacks and prominent attorney Ralph Capitelli and Judge Terry Alarcon began to be discussed in connection with placing UGI video poker machines in the Fairgrounds.

In June 1992 UGI required of Deputy Chief Saacks that he get some sort of written permission from Chief of Police Taylor to be involved in their proposed venture. Mr. Saacks obtained a NOPD Paid Detail/Outside Employment form, filled it out, and took it to Chief Taylor, who signed it. Shortly thereafter in early July 1992, Chief Taylor handed down a new General Order forbidding members of NOPD from being involved in some aspects of the video poker/gaming industry. Shortly after G.O. 387 came out UGI required Mr. Saacks to modify his Paid Detail/Outside Employment form. Consequently Mr. Saacks caused a second form to be typed, which he presented to Chief Taylor in a meeting. Chief Taylor, who had the power to make exceptions to any of his or department General Orders, signed the second outside employment form for Mr. Saacks. Although both the original and second forms that Mr. Saacks presented to Chief Taylor were somewhat vague as to exactly what, where, and when Mr. Saacks would be doing in the video poker industry, the Hearing Examiner believes Chief Taylor was well aware that he was making an exception for Mr. Saacks from his new General Order. The Hearing Examiner believes Chief Taylor knew Deputy Chief Saacks had put a great deal of time and effort into this video poker venture. Being the congenial Chief that he was, Chief Taylor let Mr. Saacks pursue his outside business interests. This view of the Hearing Examiner is corroborated by various testimony including Chief Taylor's secretary, Jeannine Estrada. See Estrada at pages 163-167 and 184-185.

As Appellant correctly notes on page 10, footnote 4, of his memorandum, any attempt by the Department of Police to expand the charges by claiming Deputy Chief Saacks' actions

were a violation of G.O. 387 cannot be sustained. OMI agent Mehrtens testified that Chief Orticke did not fire Antoine Saacks for a violation of G.O. 387, and that he (Mehrtens) found that Deputy Chief Saacks never went to work for a video poker company nor performed any duties which would have been a violation of G.O. 387. Likewise Capt. Aschebrock's testimony shows that it would be hard to sustain a violation of G.O. 387, because it does not forbid working in the video poker business as a "consultant."

A one-sixth ownership interest in the Louisiana corporation being discussed as a subsidiary of UGI could have been worth a great deal to Mr. Saacks. Essentially, his role was to be a security consultant to UGI. However, at some point in time UGI decided it did not desire Mr. Saacks, as a partner in the business transaction. Wherefore, Mr. Saacks negotiated a settlement for himself with UGI that paid him $325,000,00 on or about August 20, 1993. See City Exh. 23.

Mr. Saacks underestimated how much professional trouble his political enemy Mr. Radosti could made from this scenario of events, Mr. Saacks was probably naive in not realizing that his dealings with UGI, trips to Las Vegas and receipt of a large sum of money from UGI could be presented to the public through the media as rank police corruption. Mr. Saacks failed to realize until too late the lack of loyalty to him by Mayor Barthelemy and Chief Taylor.

On November 19, 1993, the MCC made a formal written complaint to new Superintendent of Police Joseph Orticke, Jr. that Deputy Chief Saacks was engaged in activities of a totally unethical nature and in complete violation of New Orleans Police Department policies and code of conduct for its officers. This lengthy letter specifically complained about Deputy Chief Saacks' activities in connection with the new video poker industry, his dealings with UGI and doing business in Louisiana as Video Services, Inc. (hereafter "VSI"), his receipt of $325,000.00 in

settlement with UGI for services rendered, and having a close relationship with a proposed video poker business partner, Frank Caracci, who is a convicted felon. No where does the MCC letter complain about appellant's activities in connection with his private paid detail business PSD.

Chief Orticke turned the MCC complaint over to Director Peter Munster of the Office of Municipal Investigation (hereafter "OMI")to investigate. Chief Orticke testified that OMI, not the Internal Affairs Division (hereafter "IAD"), is the appropriate entity to investigate a Deputy Chief. However, IAD was very much involved in this matter, and high ranking members of IAD, such as Captain Henry Aschebrock and Major Richard Reeves, were advising Chief Orticke on various aspects of the case.

Mr. Radosti of the MCC had already consulted Mr. Munster on November 12, 1993, concerning the complaint against Deputy Chief Saacks. Mr. Munster advised CAO Leonard Simmons of the MCC forthcoming complaint on November 15, 1993. Further, Mr. Saacks was summoned to Mayor Barthelemy's office on November 16, 1993 to discuss with the Mayor, Mr. Munster and the CAO, Leonard Simmons, the MCC allegations. Mr. Saacks assured the Mayor that there was nothing illegal or improper with his business dealings with UGI. Mr. Saacks prior to the November 19 , 1993, letter heard that allegations were being leveled against him in connection with "illegal/legal gaming operations", because he wrote to Mr. Munster on November 18, 1993, requesting that these charges be investigated. In the next few days the MCC held a press conference to make public their charges against Deputy Chief Saacks, and in turn Deputy Chief Saacks issued a News Release denying the allegations of the MCC. On November 22, 1993, former Chief Taylor threw Deputy Chief Saacks a vicious left hook to the chin by denying to OMI that he signed the Paid Detail/Outside Employment form. Consequently, it was reported in the media that Deputy Chief Saacks had forged

the form in question. Shortly thereafter, Mr. Saacks was suspended from NOPD because of the forgery allegations.

The Hearing Examiner believes that after former Chief Taylor denied signing the outside employment form a calculated movement began to dump Deputy Chief Saacks, because of public relations concerns by the Barthelemy Administration. Also other political rivals no doubt saw this as an opportunity to get rid of Mr. Saacks. Instead of defending one of its brightest officers, or at least remaining objective, the Administration, NOPD and OMI decided to go for the jugular by conducting an administrative search of Mr. Saacks' and Lt. Canal's offices for information concerning their business PSD, which had absolutely nothing to do with the MCC complaint. It was generally agreed by the participants in the search that for criminal law purposes the search was without probable cause and therefore illegal. However, the objective was to find something to use against Mr. Saacks administratively.

The administrative search did uncover business records of PSD, including billing records to movie production companies. OMI ultimately concluded these records showed Mr. Saacks and Lt. Canal's company had bilked its customers out of thousands of dollars and shortchanged the officers who worked the individual movie details. OMI made public through the media its findings regarding PSD. A lengthy investigative report was compiled by OMI Agent Robert Mehrtens, who was assigned the case, charging Chief Deputy Saacks with a laundry list of violations. During the course of its investigation OMI showed its bad faith and partiality by refusing to have former Chief Taylor's signature on the outside employment form analyzed by a competent hand writing expert proposed by Mr. Saacks.

On or about March 10, 1994, OMI's Investigative Report was completed and forwarded to Chief Orticke. Interestingly, the OMI report cited approximately ten charges against Deputy Chief Saacks, but with the exception of the

charge of associating with a known felon, OMI had abandoned the MCC's allegations of misconduct. The MCC's accusations regarding Deputy Chief Saacks' involvement with video poker interests only served as a vehicle to charge Mr. Saacks with the technical violation of failure to obtain a Paid Detail/Outside Employment form.

Mr. Saacks was briefly reinstated as a Captain on March 21, 1994. However, on April 11, 1994, Appellant was notified that a pre-termination hearing would be conducted on April 18, 1994. At the pre-termination hearing neither Mr. Saacks' attorneys nor PANO President Ronald Cannatella were allowed to speak on behalf of Mr. Saacks and address the charges against him. Sgt. Cannatella testified that he and attorneys for numerous officers had always been allowed to speak at pre-termination hearings and had on occasion been successful in persuading previous Chiefs that termination was not called for. The failure of Chief Orticke to hear Deputy Chief Saacks' counsel and representatives at the pre-termination hearing is further evidence that the pre-termination hearing was a mere formality and that it had been predetermined by the Administration and Chief Orticke to fire Deputy Chief Saacks no matter how much of a stretch it was to make a case against him for dismissal. Sgt. Cannatella's testimony was quite riveting and believable. Sgt. Cannatella does not consider himself a friend of Antoine Saacks and some people in PANO, of which Sgt. Cannatella is President, consider him an adversary.

This conclusion is further bolstered by the testimony of Captain Henry Aschebrock of IAD. Capt. Aschebrock is also an attorney and had been involved in disciplinary actions of NOPD for many years. Capt. Aschebrock did not believe the charges against Deputy Chief Saacks warranted dismissal. The Hearing Examiner has no doubt that Capt. Aschebrock and other members of IAD advised Chief Orticke that a dismissal was not warranted in this case.

Likewise the Hearing Examiner finds credible the testimony of Mr. Saacks that former Asst. City Attorney Reggie Laurant told him (Mr. Saacks) that he (Laurant) had advised Chief Orticke on two occasions that that these charges did not warrant dismissal. Nevertheless the day after the pre-termination hearing Chief Orticke terminated Deputy Chief Saacks for the following charges:

1. Associations With A Felon
2. Failure To Obtain A Paid Detail/Outside Employment Form
3. Neglect Of Duty In Failing To Supervise Lt. Canal
4. Misuse Of Department Property/Theft
5. Adherence To Law For Failure To Obtain An Occupational License
6. Unauthorized Public Statements And Appearances

With regard to each of these specific charges the Hearing Examiner finds that the testimony and evidence in the record revealed the following:

I. ASSOCIATIONS

Antoine Saacks is charged with associating with a convicted felon, Frank Caracci, in violation of NOPD Rule 5. The text of rule 5 can be found in both parties briefs and various exhibits. Frank Caracci is the father of Mark Caracci, a partner in the law firm of Martiny & Caracci, and a former partner of Jefferson Parish Sheriff Harry Lee. A number of years ago Mark Caracci moved into a home a few doors from Antoine Saacks, and the two became close friends. Antoine Saacks and Mark Caracci's families went on vacations together and they bought a bar business together, Jimmy C's. Through his relationship with Mark Caracci, Antoine Saacks met and came to know Frank Caracci.

Frank Caracci is a life long resident of New Orleans and has owned a number of businesses and property in the City, including the Court of Two Sisters. It is undisputed that Frank Caracci has the two aforementioned convictions from the early 1970's. However, Frank Caracci has never been

convicted of any other charges, and enjoys all benefits of citizenship, including voting in every election. See Appellant's Exh. 28. The City Attorney argued repeatedly throughout the hearing that Governor Edward's pardon was meaningless and of no legal effect on Mr. Caracci' s Federal convictions. The City Attorney likewise sought to discredit Mr. Caracci's pardon because one count was omitted.

The Hearing Examiner disagrees with the City Attorney's assessment of the pardon, regardless of any technical deficiencies it may have or in the eyes of Federal authorities. If nothing more the pardon shows the Governor had confidence that Mr. Caracci was not a notorious gangster. As Appellant's attorneys correctly note in their brief, many career police officers and high level City Officials were called to testify and they did not know Frank Caracci was a convicted felon, including Chief Orticke and OMI case agent Robert Mehrtens. See page 4 of Appellant's brief. If all of these people can be unaware of Mr. Caracci's convictions, then certainly Mr. Saacks could have been. More simply stated, the Department of Police failed to carry its burden of proof that Appellant knew Frank Caracci was a convicted felon.

Even if Mr. Saacks had been aware of Mr. Caracci's record, their association together hardly merited discharge, whether this charge is taken alone or in conjunction with the other charges. Former Chief Arnesta Taylor testified that this rule was not enforced. See Taylor's testimony at p. 26 to 36. Chief Taylor admitted candidly that quite often other officers in NOPD have regular and frequent contact with a convicted felon on both a personal and business nature. Counsel for the Department of Police argue that Chief Taylor's testimony is of no moment, because Chief Orticke enforced the rule, at least in this case. However, the so called offensive association took place while Chief Taylor, not Chief Orticke, was in charge of the Department. Chief Taylor's attitude towards the rule and its nonenforcement is very relevant. Chief Taylor hired a

convicted felon, Levi Wallace, to work at Chief Taylor's grocery store. Counsel for the Department of Police attempt in their post trial memorandum to distinguish between an "employee" and an "association" although creative, is unpersuasive.

The point is that prior to this case the rule was rarely, if ever, enforced. The Hearing Examiner believes Rule 5, as written, is somewhat ambiguous and certainly subject to various interpretations in various fact situations. See the testimony of Capt. Aschebrock at p. 171 and 314. Obviously the rule has some merit in that NOPD is justified in discouraging its officers from socializing with hard core, active criminals. Such associations can lead to public mistrust and possible corruption of good officers. Under the facts of this case, assuming Antoine Saacks knew of Mr. Caracci's background, a warning would have been sufficient that such business dealings by a Deputy Chief with a convicted felon have the appearance of impropriety to certain members of the public - especially those who are opposed to gaming. Likewise Chief Orticke would have been within his discretion to relieve Antoine Saacks of his Deputy Chief appointment and return him to his regular duties as a Captain. But even this action, in light of what was presented about and by Mr. Frank Caracci, would have been harsh and merely catering to the MCC's call for public outrage. As Mark Caracci testified, "My father is a victim in this whole affair."

II. FAILURE TO OBTAIN A PAID DETAIL/OUTSIDE EMPLOYMENT FORM

A. United Gaming, Inc./Video Services, Inc.

When the Department of Police and OMI realized there was nothing illegal about Deputy Chief Saacks' dealings with UGI and with his receipt of $325,000 from UGI in settlement of any claims he might have against this gaming company, that he had not forged Chief Taylor's signature on the Paid Detail/Outside Employment forms for Video Services, Inc., that he had obtained an exception from Chief Taylor to G.O.

387 and/or had not violated G.O. 387, they forged ahead by charging him with failing to obtain a Paid Detail/Outside Employment Form for work performed for UGI. Appellant argues that he never worked for UGI, citing the testimony of the previous president of UGI, Carol Carter.

> Q. Did Antoine Saacks ever work for United Gaming?
>
> A. No. He did not,
>
> Q. Isn't it true, Ms. Carter, that Mr. Saacks was seeking some type of relationship or seeking some type of future relationship with the Louisiana Division of United Gaming?
>
> A. Yes.
>
> Q. And his activities as it relates to United Gaming, was to further that end he had in mind?
>
> A. That is correct.
>
> Q. And to your knowledge, there has never been any employment agreement with Antoine Saacks in effect?
>
> A. To the best of my knowledge, there never has been.

See Carter at p. 115 - 116. This is very persuasive testimony from the City's own witness, whom the Hearing Officer found to be very credible.

The appointing Authority argues that the best evidence to prove that Antoine Saacks worked for UGI is the Final Receipt, Release, Hold Harmless and Indemnity Agreement wherein it states that the "payment of the Three Hundred Twenty-Five Thousand and No/100 ($325,000.00) Dollars is in full settlement and full satisfaction of all claims and/or damages which may have been earned or suffered by Saacks..." The City emphasizes the words "compensation" and "earned" in its Post Trial Memorandum. Antoine Saacks counters by emphasizing that the settlement was paid for "damages and injuries." In support of that position appellant testified that his accountant advised him that he would not have to pay taxes on this personal injury type settlement that was not employment related. Further Antoine Saacks cites the testimony of UGI official Robert Woodson that the settlement

was paid merely to avoid the possibility of litigation regarding the future ownership interest.

> Q. Was it your understanding that the $325,000.00 ... was paid to Mr. Saacks in lieu of the equity interest that he was no longer able to obtain, because of the fact that he could not get through the licensing process?
>
> A. No. I think, the $325,000.00 ... paid to Mr. Saacks was paid to him, because or it was my understanding that there was a threat to file a lawsuit against the company and we evaluated that particular threat ... and I believe, the company or we engaged discussions with our Louisiana counsel and .... in order to get this matter expeditiously put behind us that is what they came up with in order to end all relationships with Mr. Saacks.

See Woodson at p. 205 - 206.

Such testimony from the Department of Police's own witness tends to repudiate the Appointing Authority's theory of the relationship between Mr. Saacks and UGI. Likewise it is almost universal practice among attorneys drawing up a Receipt and Release for a sophisticated, complicated or expensive dispute to include language to cover all possible claims whether arising out of tort, contract, quasi - contract, or employment, although the actual nature of the claim may lie in one area of the law more that the others. After listening to three (3) months of testimony and reviewing the Final Receipt, Release, Hold Harmless and Indemnity Agreement (City Exh. 23), and Antoine Saacks' letter of July 14, 1993 to Fred Wilms, Chairman of the Board of UGI (City Exh. 6), the Hearing Examiner believes that the true relationship between Mr. Saacks and UGI was not an employment relationship. Mr. Saacks did expend a certain amount of his personal time and effort helping UGI get its foot in the door in Louisiana, introducing UGI to the right people for establishing a successful Louisiana subsidiary of UGI to be called Video Services, Inc. For his efforts Antoine Saacks had a verbal agreement with UGI and others here in Louisiana that he

would receive a one sixth (1/6) stock ownership in the company. However, UGI perceived that there could be problems with the Nevada Gaming Commission, if Mr. Saacks was included in the deal, because of Mr. Saacks' position with the police department. Consequently, the settlement was paid as damages for UGI's breach of the contract and/or to buy out Mr. Saacks' 1/6 future ownership interest in VSI.

OMI, Chief Orticke, and counsel for the Department of Police rely too much on statements made by Deputy Chief Saacks that he "worked thousands of hours" for UGI. See November 24, 1993 News Release by Antoine Saacks, City Exh. 7 and OMI Statement of Antoine Saacks on December 5, 1993, City Exh. 3. Chief Orticke testified that the only evidence that suggested that Antoine Saacks worked for UGI was Saacks' statement regarding the thousands of hours worked. See Orticke at p. 320. However, the phrase "worked thousands of hours" is being taken literally and out of context by Chief Orticke, as well as Agent Mehrtens of OMI, who concluded that this is proof of a violation of ASOP 85.0, since Mr. Saacks had no Outside Employment Form for such "work." A reading of the entire News Release, Antoine Saacks' OMI statement, and Mr. Saacks' consistent testimony throughout the hearing shows that these hours worked were not paid employment, but was time invested to become a part owner in a local business if and when it was formed. There was no guarantee that video poker would even pass and that anything would come from Deputy Chief Saacks' efforts. Likewise former Chief Taylor testified that officers need not submit an outside employment form for using personal time to further potential future employment.

> Q. Now, Chief, isn't it true that the fact that he used his personal time to further his potential future employment with Video Services, Inc., is not a violation of rule?
>
> A. That is correct.

Q. That is because he was not getting any regular paycheck and he was not performing the services of a consultant for the video company; isn't that correct?

A. That is correct.

Finally Agent Mehrtens conceded that there was no evidence that these hours expended by Deputy Chief Saacks ever a three year period interfered with the performance of his duties with N.O.P.D.

Q. Mr. Mehrtens ... What documents do you have or what evidence do you have that any of the 2 to 3000 ... hours worth of work he alleges he calculated that he did had interfered with his job in any way?

A. None.

Thus Deputy Chief Saacks had invested his personal time in trying to develop an ownership interest in a potential new company in a potential new industry in Louisiana. Appellant has a strong argument that such efforts do not fall under ASOP 85's requirement of a signed Paid Detail/Outside Employment Form. Even if one accepts the City's literal interpretation of the facts and rule in this case, the most one can conclude is that a minor violation has been committed. Chief Orticke could have warned Deputy Saacks and the entire force that in the future such activity in trying to establish outside businesses or future employment will require a signed authorization form under his administration. Former Chief Taylor certainly knew Deputy Chief Saacks was involved in a video poker enterprise, and never warned him not to be involved nor told Appellant he needed his (Taylor's) permission on an outside employment form. See testimony of Major Howard Robertson at p. 67 - 68 and 74. Chief Taylor was in charge at the time of the alleged offensive conduct, not Chief Orticke. It is patently unfair for the Department at a later date to try to make this into some sort of heinous offense.

B. Jimmy C's Sports Bar and Grill, Inc.

Counsel for N.O.P.D. argue that since Deputy Chief Saacks has acknowledged a prior ownership interest in Jimmy C's Sports Bar in Metairie, Louisiana, and admitted that he did not obtain an outside employment form for this business then he has violated ASOP 85. Antoine Saacks' position is that this business was a corporation and he was merely an investor. Very credible testimony from Mark Caracci supports Mr. Saacks' own testimony that they (M. Caracci and Saacks) were merely investors and customers of this lounge and did not actively participate in its day to day operations. Consequently, Deputy Chief Saacks did not think he needed permission from anyone to form a corporation.

The Appointing Authority counters that since Mr. Saacks participated in some decisions regarding Jimmy C's operation, that this is mental exertion which comes within the definition of work and employment at a business. Shareholders in a corporation can participate in important decisions involving the corporation, such as electing directors, without being employed by the company. Consequently, although counsel for N.O.P.D. is correct that the fact that Jimmy C's lost money is of no moment in determining whether Antoine Saacks worked for the business, the Appointing Authority nonetheless failed to prove that Deputy Chief Saacks worked for Jimmy C's and therefore needed a signed Outside Employment Form.

Appellant's position regarding this interpretation of ASOP 85.0 is also confirmed by other witnesses. Deputy Chief Duane Johnson, a witness called by the City, stated that "if you simply owned stock and you are talking about as an investment, then, I do not see where that would need the chain of command approval to purchase stock." See Johnson at P. 270. The same response was given by Chief Taylor at p. 47 - 48. Chief Taylor also agreed that the rule is not very clear on this point. Interestingly, another City witness, Lt. Christopher Maurice, a former Commander of the Inspections Department, which manages the filed Detail/Outside

Employment Forms, testified that he owned a company that imported rare birds, that he traveled to foreign countries to obtain these birds, and that a local partner handled the day to day operation of the business. Therefore, Lt. Maurice testified, he did not have or need a Paid Detail/Outside Employment Form because he was merely an investor and was not employed on a daily basis. See Maurice at 335, 337 - 338 and 341.

Finally OMI agent Mehrtens testified that there is no evidence that Antoine Saacks' involvement with Jimmy C's in any way affected his efficiency as a police officer or the efficiency of N.O.P.D. See Mehrtens at 196. Therefore the Hearing Examiner does not believe a violation of ASOP 85.0 has been proven in connection with Jimmy C's. Even accepting the Department's argument that a violation occurred, then at most it would be a minor technical violation. Chief Orticke could have directed Deputy Chief Saacks to submit the form and sent out a clarifying memorandum to all members of the force that under his administration such stock ownership in a local corporate business will require an ASOP 85.0 signed authorization form.

C. Police Security Detail, Inc./JFK

Antoine Saacks is also charged with violating ASOP 85.0, in connection with his part ownership of Police Security Detail, Inc. and acting in the film JFK. Appellant argues in his Post Trial Memorandum that there was no testimony that he worked for PSD. The Hearing Examiner disagrees with Deputy Chief Saacks on this point. The City correctly points out that Antoine Saacks testified himself that he was the upfront man, who got the business, and that L.J. Canal handled the day to day operations of the company, such as scheduling and billing. It is true that the overwhelming weight of the other witnesses' testimony is that L.J. Canal ran this detail business and that they had no dealings with Antoine Saacks in connection with PSD. See the testimony of Karen Barbaro at p. 17, 43 - 44 and 50; testimony of George

Saberre at p. 238; testimony of Russell Vappie at p. 29; and testimony of Capt. Anthony Genovese at P. 177 and 196.

However, Antoine Saacks was handling an important aspect of the business, in dealing with potential clients and promoting PSD's services. Thus, Antoine Saacks was more than an investor in the corporate entity PSD. He received 50% of the profits for his efforts. Deputy Chief Saacks personally omitted to secure a signed Paid Detail/Outside Employment Form. Mr. Saacks did testify that his partner, L.J. Canal, submitted forms each year for PSD in his name (Canal's) and Saacks' name. Antoine Saacks also testified that Lt. Canal submitted forms for Saacks' role in JFK. See Saacks at p. 100 and 115. Unfortunately those forms are missing from N.O.P.D. files, but detail forms for Chief Orticke and Chief Taylor are also missing. The Hearing Examiner has no reason to doubt Antoine Saacks' testimony regarding Mr. Canal's filing of the forms for PSD and such a filing with Mr. Saacks' name thereon would satisfy the requirements of ASOP 85.0. Due to poor health Lt. Canal was not called as a witness to corroborate Mr. Saacks' testimony.

Finally even if Lt. Canal also failed to submit an outside employment form for himself and Mr. Saacks for PSD, the appropriate disciplinary action would have been corrective action. As Chief Taylor testified, it was not unusual for someone to go to work and then get a paid detail form afterwards. See Taylor at p. 62. Capt. Robert Hecker testified that he submitted an outside employment form for his past detail coordinating activities after Mr. Saacks was terminated. Likewise, Major Ronald Serpas did not have a proper detail form for his detail company, but he was permitted to submit one after the fact. See Aschebrock at p. 251 - 252 and Mehrtens at p. 274.

Alternatively, as Christopher Maurice, the former Commander of Inspections testified, an officer who violates ASOP 85.0 usually is suspended for a few days. See Maurice at 314 - 315. The City's attorney argued on a number of

occasions throughout the hearing that a Deputy Chief, because of his obligation to set a good example for the rank and file, should receive more severe punishments for the same offense. The Hearing Examiner disagrees with counsel's assessment. Unduly harsh and unequal punishment would be detrimental to the morale of the Department. A two (2) day suspension is the most punishment that could be justified in this case for this alleged violation.

III. NEGLECT OF DUTY IN FAILING TO SUPERVISE L.J. CANAL.

Deputy Chief Saacks is charged with a violation of Department Rule 4.4, relative to Performance of Duty/Neglect of Duty. The pertinent sections of this rule for this case appear to be:

> a. Each member, because of his grade and assignment, is required to perform certain duties and assume certain responsibilities. A member's failure to properly function in either or both of these areas constitutes a neglect of duty.
>
> b. A member with supervisory responsibility shall be in neglect of duty whenever he fails to properly supervise subordinates, or when his actions in matters relating to discipline fail to conform with the dictates of Departmental Rules and Regulations.

Section C(6) of Rule 4 cited in the April 19, 1994, discharge letter to Antoine Saacks from Chief Orticke is not even remotely applicable to the specific allegation that Deputy Chief Saacks was guilty of neglect of duty in failing to supervise properly Lt. Canal in the operation of their private company Police Security Detail, Inc. (PSD). See City Exhibit 1.

The Department of Police's theory on this charge as stated in its Post Trial Memorandum is as follows:

> Although he claims that he was not responsible for L.J. Canal, under the normal chain of command he

was a Deputy Chief and L.J. Canal was a Lieutenant. There were many discrepancies in the billing and other violations of police rules and regulations that are directly attributed to Lt. Canal. (emphasis added).

The Hearing Examiner believes the City's efforts to sustain a violation of this rule is for one or two purposes. It is possibly a boot-strap attempt to blame Deputy Chief Saacks for any discrepancies in PSD'S billing records, because the City cannot prove Antoine Sacks is guilty of the misuse of City Property/Theft charges. Alternatively, it is a charge thrown into the mix, so as to bolster the cumulative effect of the alleged misconduct and justify discharge because of the number of offenses. Whatever the reason it shows a certain desperateness on the part of the City to get rid of Deputy Chief Saacks.

The City offers no additional facts to sustain this charge other than the ones brought forth in connection with the Misuse of City's Property/Theft charges. Likewise the rule is at best silent with regard to its applicability to off - duty private affairs. The Hearing Examiner agrees with Appellant that the true intent of Rule 4 is to govern the supervision that occurs within the parameters of police work. Obviously a superior officer should not turn a blind eye to misconduct by a subordinate even in off - duty settings, but the overwhelming weight of the evidence in this case indicates that Chief Deputy Saacks did not know or was not involved in Lt. Canal's billing practices in connection with PSD. Therefore, Mr. Saacks did not turn a blind eye to any alleged misconduct by Lt. Canal. It is simply an unfair stretch to say therefore that Antoine Saacks is guilty of Neglect of Duty for not supervising more closely his equal partner in their private business.

Further, Appellant correctly points out in his Post - Trial Memorandum that Lt. Canal has never been charged nor disciplined for any wrong doing. If a subordinate is not charged with, much less found guilty of, any acts of

commission or omission, it is problematic, if not legally insupportable to charge a superior officer with failing to prevent by proper supervision. The alleged offending conduct of Lt. Canal occurred nearly two years ago on certain invoices in June 1993. Deputy Chief Saacks was suspended in November 1993, and Lt. Canal did not have his first stroke until late January 1994. Possibly the Department of Police should be commended for its restraint in pursuing charges against Lt. Canal due to his health. It is more likely, through, that the City fears that trying Lt. Canal on the charges of misuse of City Property/Theft will only further point out what we already know - that Lt. Canal handled all the billing for PSD, not Deputy Chief Saacks. The Hearing Examiner feels that the Appointing Authority has failed to carry its burden of proof on the charge of Neglect of Duty.

IV. MISUSE OF DEPARTMENT PROPERTY/THEFT.

A great deal of testimony at the hearing in this case centered around what has recently become the controversial topic of off-duty private details performed by members of NOPD to supplement their very low wages. It is common practice for older, ranking officers to coordinate these details in various ways. Deputy Chief Antoine Saacks and Lt. L.J. Canal were 50/50 partners in a corporation Police Security Detail, Inc. (PSD), that coordinated off-duty details for other officers. PSD's niche in the detail business was primarily with the movie industry.

In connection with his part ownership of PSD, Antoine Saacks has been charged with misusing NOPD equipment in violation of Rule 7.1 of the Department and Theft in violation of La. R.S. 14:67. The pertinent provisions of Rule 7.1 are:

> 1. Members shall use Department property only for the purpose for which it is intended and in accordance with Department policy, rules, procedures and orders....

The pertinent provisions of La. R.S. 14:67 are as follows:

> A. Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices, or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential...

These charges were somewhat confusingly jumbled together. See Capt. Henry Aschebrock testimony at pp. 128, 222 - 223, and 323 - 325. Capt. Aschebrock, who also is an attorney, was at the time one of Internal Affairs Division's ranking officers who was consulted by Chief Orticke on the Saacks case. Capt. Aschebrock stated that this charge was extremely confusing, and he could not decipher why OMI had listed this charge when he is not sure if the allegations ever occurred. Capt. Aschebrock testified:

> I am not certain, at all, about what the theft charge was for. It was for over-billing of invoices? I'm not sure if that even existed, really. It could have been for the use of the Department's property. Aschebrock at p.128.

Later at p. 222 the following exchange can be found:

> Q. Is that referring to the telephones or to the fax machines or the movie equipment?
>
> A. I assume they are referring to everything that was owned by the City that may have been used without the City's approval or knowledge.
>
> Q. But that is not a charge of theft, is it?
>
> A. No.

The Hearing Examiner, after listening to 3 months of testimony concerning these allegations and reviewing the exhibits in connection therewith, believes that the theft charges are confined to Lt. Canal's billing practices on a couple of invoices billed to the production company that made the movie The Pelican Brief. The victim, if those

allegations were proven, would be the production company, not the City. Likewise there was absolutely no testimony from any officer who worked for PSD that he was not paid what he was promised. The Department feels that such an offense, if attributable to Deputy Chief Saacks, is a dischargeable offense, because it would be an act that would bring discredit to the NOPD. See Civil Service Rule IX, Section 1.1, relative to Disciplinary Actions/Maintaining Standards of Service. The Hearing Examiner agrees that an officer or any city employee found guilty of theft, even while off duty, is subject to discharge.

The biggest problem with the City's case of theft against Deputy Chief Saacks is that there was simply no proof that he knew or was involved in the alleged overbillings. If he had no knowledge and no involvement in the alleged offensive conduct, then he could not have intended it. "Intent" is a crucial element to sustain a violation of R.S. 14:67.

Karen Barbaro, the secretary who prepared the invoices and checks for PSD, did not even know that Lt. Canal had a partner in the operation for some time. She testified repeatedly that she never received any orders or instructions from Antoine Saacks regarding preparation of the invoices or conducting the business of PSD. See Barbaro at p. 17, 43 - 44 and 50 - 51. The Hearing Examiner found Ms. Barbaro to be a very credible witness and has no reason to doubt her testimony that Deputy Chief Saacks had nothing to do with the day to day operations of the company. Officers working the details consistently stated that they never dealt with Chief Saacks. See Saberre at p. 238; Vappie at p. 29 and 44, Genovese at p. 177 and 196, and Trahan at 357. The Hearing Examiner has no reason to doubt these officers' testimony. Further, the Appellant, Antoine Saacks denied any involvement in the disputed billing practices. The Hearing Examiner found Mr. Saacks a very credible witness on this and all other critical issues. Although Deputy Chief Saacks might have motivation to lie, as any Appellant would if he had

done something wrong, nonetheless Mr. Saacks' testimony was substantiated by credible witness after credible witness. Like most witnesses under the pressure of cross-examination Appellant could be evasive on occasions. However overall Antoine Saacks' testimony rang true repeatedly and was substantiated by an impressive array of witnesses.

Likewise the Hearing Examiner has serious doubts that the City met its burden of proof that the production company for The Pelican Brief was overcharged. The City seems to rely almost entirely on the conclusions of OMI agent Robert Mehrtens, who is not an accountant. Amazingly, Agent Mehrtens and OMI did not bother to contact the movie company before concluding that it had been bilked by a "sly" Lt. Canal.

Had OMI investigated these matters more closely it would have learned that movie companies are tightly budgeted organizations that will not pay for services or goods without strict scrutiny of every entry on a bill. As Gary Huckabay, Warner Brothers' Location Manager for The Pelican Brief testified: "Every penny is documented." See Huckabay at p. 23. The officers' time, as listed on the invoices, were checked throughout the day by movie personnel, to insure proper and accurate billing. Again Mr. Huckabay explained, as follows:

> We would check to see if the officers and, you know, because the production manger can walk around and say, "What is this guy doing standing over there. If he is loafing around we do not need him. So I kept a sharp set [of notes] basically... I knew how many men were there and I would make sure that their duty there was what I said it was for. So there was no loafing around. See Huckabay at p. 28.

Mr. Huckabay's testimony was corroborated by Larry Lombas, a former Sergeant with NOPD who retired after 27 years and Capt. Anthony Genovese. See Lombas at p. 82 - 85

and Genovese at p. 178 - 179. Further, Sgt. Lombas and Mr. Huckabay explained that the movie representatives, either Mr. Huckabay or Mr. Howard, would issue a P.O. Number after each entry signifying that the charge was checked by at least three movie executives, the production manager, the producer, and accountant who would all scrutinize every invoice. See Lombas at p. 87 and Huckabay at p. 21 - 22. If he felt there was a mistake on an invoice, he would not hesitate to bring it to PSD's attention.

Further, Mr. Huckabay and the production company were well aware that when City equipment was being used, such as police cars or barricades, that such equipment was being provided by the City free of charge. See Huckabay at p. 20 - 21. It is hard to believe, in light of the aforementioned very credible testimony that Lt. Canal could somehow get the movie company to pay for said free equipment or for men who really did not work. The evidence did show that Lt. Canal was not a polished book keeper or accountant himself. Lt. Canal's invoices were the sloppy records of a novice. There is serious doubt that he could have fooled the production company's staff and accountant.

The only witness of substance for the City whose testimony tended to substantiate Agent Mehrtens' theory and audit of PSD was Mark Jee, Chief of Fire Prevention Division for the New Orleans Fire Department. His records for a Fire Department detail job for The Pelican Brief indicate that 8 firemen were sent to the movie set for an explosion scene. The movie production company, rather than paying the firemen or Fire Department directly for this job, required PSD to include this crew on one of its invoices. See Invoice 14, City Exhibit 12. The invoice, however, charges for 10 firemen.

However, Mr. Huckabay testified that it was he who provided to PSD a list of firemen and their hours worked to be included on the PSD invoice. See Huckabay at 120 - 121. The list of firemen for the explosion scene was coordinated

between Mr. Huckabay for the movie company and Mr. Jee for the Fire Department. Lt. Canal and Antoine Saacks had nothing to do with these negotiations. PSD as a convenience to the firemen and movie company included their time on its invoice, because PSD had a federal I.D. number. This allowed the firemen to get paid within a week without red tape. See Huckabay at p. 34 - 35.

The Hearing Examiner is not certain what is the source of this discrepancy. Possibly it can be attributed to the complicated process of filming a dangerous explosion scene in an urban neighborhood. Mr. Huckabay testified that last minute changes were common. Certainly more firemen could have been ordered at the last minute that did not appear in Mr. Jee's records. What does seem to be unlikely is that Lt. Canal could have so easily duped a sophisticated production company. Wherefore, the City failed to carry its burden of proof that a theft occurred. Even if Lt. Canal did engage in overbilling practices, there was no proof Antoine Saacks knew of or was involved in said fraudulent conduct. Therefore, the charge of theft cannot be sustained.

With regard to Misuse of Department Property, the Appointing Authority alleges that Deputy Chief Saacks violated Rule 7 in that he used the NOPD address, telephone number, telephones, fax machines and computers to further his private business. Surprisingly, in its Post Trial Memorandum the City has only a few brief paragraphs complaining of Mr. Saacks' use of the NOPD telephone number and address on his Police Security Detail Stationary and his use of Department telephones and equipment in furtherance of his personal business. The City also complains Deputy Chief Saacks used his Chief of Detective business card and telephone number in dealing with movie companies. Throughout the hearing counsel for NOPD railed repeatedly at the boldness of PSD in using the 715 South Broad St. address and headquarters telephone number on its stationary, as well as NOPD equipment.

Appellant rebutted this charge at the hearing and in his Post - Trial Memorandum with a number of relevant points. First it is extremely common practice for officers to receive personal mail at their district or at headquarters. See Genovese at p. 186, Saacks p. 116, and Barbaro at 63. Neither Deputy Chief Saacks nor his partner Lt. Canal had the offending invoice stationary printed. It was created on a computer by Peter Wilson and given to Lt. Canal as an unsolicited gift. See Saacks at p. 99 and Barbaro at p. 69 and 72. Lt. Canal used some of these invoices to bill movie companies. Lt. Canal also used invoices with the address 3535 Ridgelake Drive in Metairie, Louisiana, See City Exh. 12 and Saacks at p. 18, 36 - 37. Further Capt. Anthony Genovese stated it was a common practice for the detail coordinators to list the headquarters' address and telephone numbers on invoices. See Genovese at p. 207, 218 - 219. Likewise Deputy Chief Rodriguez was not surprised to see police headquarters' address or telephone number on the invoices. "A lot of the detail information came to the people at Headquarters, because it was coordinated out of Headquarters or out of different areas of the Police Department," testified Deputy Chief Rodriguez. See Rodriguez at p. 42 - 43. Both Capt. Genovese and Deputy Chief Rodriguez, who is now retired, are very impressive witnesses, and the Hearing Examiner finds their testimony very credible.

Appellant is no doubt correct in his assertion that the terribly poor salaries of New Orleans police officers is one of the main reasons NOPD has tolerated and even assisted officers' operation of details out of the district stations and headquarters. As stated clearly and to the point by Sgt. Harry Mendoza, the policy of the Department was one of total cooperation.

> Well, the common practice was that everything the Department had, insofar as the details were concerned, was there and it was available. Every

> level of the Department's ranking structure utilized every means available to them to see that the details were being filled and the other members of the Department were made available the opportunity to work details. Now, with the telephones and then, later on the fax machines, originally, the teletype services were all used. It was posted, you know, memos were posted for details. It was a common practice and it has been a common practice. It was really made to actually make it available to make a fair wage. See Mendoza at 165 - 166.

Capt. Henry Aschebrock testified that out of necessity there are portions of some details that have to be conducted within the Police Department. See Aschebrock at 254. Officers pick up their checks for details coordinated by other officers, such as Arthur Bertucci's Superdome Detail, at Headquarters. See Hecker at 210, Vappie at 89 - 90, and Williams at 313 - 314. Some officers who coordinate details not only use the department equipment to coordinate details, but they also use the NOPD district bank accounts to disburse the funds to officers. See Genovese at 182 - 183 and Wigginton at 294 - 295. Numerous officers testified they receive telephone calls while on duty relative to their availability to work off-duty details.

Thus, detail coordinators, although availing themselves of Department property to make extra money, were likewise helping make extra money for the all the rest of the rank and file. The practice was common, open and above board. The Hearing Examiner is aware that the new Chief is tightening the detail system somewhat, which is his prerogative. However, at the time of the alleged misuse of the Department's address, telephone number, fax machines, etc. by Antoine Saacks, Lt. Canal and their company PSD, there was a different Chief, Arnesta Taylor, and a different policy. Chief Taylor stated that the teletype and the fax have been

used by officers to list available details and this activity is not a serious violation of the Department's rules. Nor would Taylor have suspended, fired, or reprimanded Deputy Chief Saacks for such a thing. See Taylor at 82 and 84 - 85. Even Chief Orticke, who sustained this charge, did not revamp the detail system. There was testimony that only recently has the detail system changed. Consequently this portion of the Misuse of Department Property charge cannot be sustained.

One other area of Misuse of Department equipment involved Deputy Chief Saacks' long distance calls on his cellular phone to United Gaming in Las Vegas, Nevada. There was never any serious dispute that ranking officers who have been issued these cellular phones can use them for personal calls. However, the City tried to imply that Deputy Chief Saacks was conducting major business transactions with United Gaming Inc. on his cellular phone at the City's expense. However, Mr. Saacks presented testimony and documentary evidence that his long distance calls on the cellular phone over the three year period in question only totaled $50.32. See Saacks at p. 168 - 169 and 188. The City never seriously disputed Antoine Saacks' $50.32 figure. This is hardly an abuse of the City's property.

Madeline Martin, who managed the phone accounts for the City stated that at least 50% of the phones had long distance calls on their bills. See Martin at 104. Throughout the testimony of a number of witnesses it was established that the officers were never given any guidelines or instructions governing permitted usage of their cellular phones. Likewise, there was credible evidence that the NOPD phone Antoine Saacks was issued was given a $1050.00 credit for referrals he made to Bell South Mobility. See Appellant's Exhibit 5 and 21; Saacks at p. 9 and 193 and Martin at 106 - 107. The City claims the credit is its by entitlement, but the credit would never have been generated if Mr. Saacks had not steered customers to Bell South Mobility. In any event the department permitted the use of its cellular phones for ranking

officers to make personal, long distance calls. See Genovese at 252 253, Rodriguez at 37 - 38, and Robertson at p. 69. Reimbursement was not required. There was also some testimony that the amount of bills generated by individual officers was a source of concern, not because of long distance calls, but simply local air time costs. Apparently Deputy Chief Saacks advocated implementing a plan whereby the City would only pay the first $100.00 to $150.00 of an officer's phone bill. The individual officers would then be required to pay for the remaining portions of their bills. See Taylor at p. 81 and Martin at p. 96. This plan was struck down by Chiefs Taylor and Orticke. See Saacks at p. 138 - 139.

If Chief Orticke was truly surprised and offended that Deputy Chief Saacks had used his Department issued cellular phone to discuss private business with a gambling company, UGI, in Las Vegas, Nevada at City expense, the appropriate response considering the small amount involved and the credit that Antoine Saacks had generated would have been a reprimand. If Chief Orticke was unaware of the credit, a one or two day suspension could possibly be justified by a new Chief who wanted to set an example. However, this charge should not be used as some sort of key building block to justify discharge, as OMI and the Department of Police apparently attempted to do.

V. ADHERENCE TO LAW - FAILURE TO OBTAIN AN OCCUPATIONAL LICENSE.

Antoine Saacks is charged with a violation of Department Rule 2.1, relative to Moral Conduct and Adherence to Law for failing to obtain an Occupational License for the ownership of Police Security Detail, Inc., under the provisions of Chapter 70.37 of the Code of the City of New Orleans. The pertinent provisions of Rule 2 and City Code are as follows:

> 2.1 Employees shall act in accordance with the constitutions, statutes ordinances, administrative

> regulations of the United States, the State of Louisiana, and the City of New Orleans...
>
> 70.37 Each person conducting the business of an employment agency...shall pay an annual license of $100.00.

Apparently counsel for the Department of Police has abandoned this charge against Antoine Saacks, as the only discussion of it appears as follows in the section of counsel's Post - Trial Memorandum dealing with owning and operating Police Security Detail, Inc. out of police headquarters without permission.

> The testimony shows that Antoine Saacks worked for this company. L.J. Canal did the day to day operations and Saacks did the marketing and up front operations. Also, Commander Robert Hecker felt it necessary to get an occupational license for his involvement but no (sic) Saacks. Additionally, Saacks received compensation for his work in this company. (Emphasis added). See City's Post Trial Memorandum at p. 14.

If the City had been serious about proving this charge, testimony or evidence needed to be produced that PSD met the legal criteria of an employment agency. Apparently Captain Aschebrock, an attorney and member of IAD, had his doubts that PSD was ever operating as an employment agency. See Aschebrock at 231 - 232 and 293.

Prior to November 1993, detail coordinators at NOPD apparently have never been required to have Occupational Licenses. Commander Robert Hecker only obtained an Occupational License in June 1994 after Chief Deputy Saacks was charged with a violation of the City Code. Prior to that he did not think he needed one.

OMI also charged Major Ronald Serpas with the same violation for operating the same type of detail company. See Ronald Serpas v. New Orleans Police Department, Case No.

4893. Chief Orticke had suspended Maj. Serpas for five days, then reduced the suspension to three days for the alleged offense. When Major Serpas appealed this action in case 4893, his appeal was sustained and the disciplinary action was thrown out by the Civil Service Commission. See Saacks at 408, Mehrtens at 60 - 61, and Aschebrock 227 - 229, 294, 302 - 303.

Counsel for the Department of Police tried to blame the result in Serpas on the way it was handled by another Asst. City Attorney. Even if PSD was an employment agency and Deputy Chief Saacks and Lt. Canal were technically in error for failing to have an occupational license, the appropriate discipline would have been corrective action, i.e. a directive by the Chief to go get your license. The Serpas case also illustrates that Chief Orticke could not have considered this a serious violation, because he reduced Maj. Serpas' suspension from three to five days. Even a three day suspension would have been excessive in the opinion of this Hearing Examiner, who did not handle the Serpas case.

Appellant also presented testimony that PSD was incorporated with a Metairie, Louisiana address, and that the company's CPA advised them that they would not need a City of New Orleans Occupational License. See Saacks at 402 and 405. Even if PSD's accountant was legally incorrect in his advice, the offense was minor and adds nothing in the City's elaborate effort to justify discharge.

VI. UNAUTHORIZED PUBLIC STATEMENTS AND APPEARANCES

Deputy Chief Saacks is charged with violating Department Rule 6, Section 3, relative to Public Statements and Appearances. The provisions of Rule 6.3 are as follows:

> Members shall not publicly criticize or ridicule the Department, its policies or other members by speech, writing, or other expression, where such speech, writing, or other expression is defamatory, obscene, unlawful, undermines the effectiveness of

> the Department, interferes with the maintenance of discipline, or is made with reckless disregard for the truth or falsity.
>
> Members shall not address public gatherings, appear on radio or television, prepare any articles for publication, act as correspondents to a newspaper or a periodical, release or divulge investigative matters of the Department without official action or proper authority. Members may lecture on "police" or other related subjects only with the prior approval of the Superintendent of Police.

It is virtually undisputed that after his suspension in November 1993, Antoine Saacks made a number of statements to the press and appeared on local radio and television shows without permission of Chief Orticke or the Public Information Office of NOPD. The City argues that these statements and appearances are consequently a "clear violation" of Rule 6 - res ipsa loquitur to use a legal expression. The City provided testimony that there is no exception to the rule for suspended officers or deputy chiefs. The rule should apply, even to personal matters, where an ongoing police investigation is involved, reasons counsel for the city.

The purpose of this rule is "so that the Department can speak with one voice." Statements in the newspaper or on television and radio which are critical of the Department are viewed as undermining the efficient operation of NOPD and the public's trust. Since some of Antoine Saacks' statements could be categorized as critical of the action taken against him, the City justifies the charge against him. "It is strictly a witch - hunt," Deputy Chief Saacks was quoted as saying in the January 14, 1994 issue of the Times Picayune. Again on March 24, 1994, he is quoted in the Times Picayune as follows: "They gave me a demotion, and they say its not disciplinary action. It's crazy."

The lofty purpose of Rule 6 as urged by counsel for the City defies reality. The Police Association of New Orleans (PANO) and the Black Organization of Police (BOP) have criticized the Department's policies on numerous occasions. The fact that these organizations' representative appears on television out of uniform, on his own time, and does not give his title as a member of NOPD, does not change the fact that the public is well aware that NOPD does not speak with one voice. Perhaps on balance this freedom of speech and freedom of the press, protected activity under the First Amendment according to Appellant, is essential to prevent political tyranny within the Department and Administration and abusive, discriminatory practices.

The key seems to be that the speech in question be made in a professional manner, free of obscene, defamatory and false statements. In that regard Captain Aschebrock would read the two cited paragraphs of Rule 6.3 together.

> Q. Have you ever read the news release?
>
> A. I read the one that are [sic] in here, in the report.
>
> Q. In your opinion as an investigator for I.A.D., is that a criticism of the Department or a defense of his actions, as alleged by the M.C.C?
>
> A. I know that there was a lot that he said in his defense. I'm not sure whether any one thing that he said may have been taken as criticism, you know. In order to be a violation, it was ruled that it has to be something that was detrimental to the Police Department or to the Superintendent, himself. It had to be some type of slanderous remark or something of that nature. See Aschebrock at p. 263 - 264.

In this case, Deputy Chief Saacks understandably felt compelled to appear before the media in an attempt to rebut extremely derogatory allegations that were widely publicized by the MCC. The MCC's letter of November 19, 1993, sent to Chief Orticke, with copies to Mayor Barthelemy, all seven members of the City Counsel, District Attorney Harry

Connick, OMI Director Peter Munster and a Special Agent of the FBI, and made public through the media contained the following inflammatory accusations:

> These are all ethical, procedural, and policy violations of NOPD codes and standards of conduct for its officers. They are a disgrace to the Department, a major embarrassment to the City, and a callous betrayal of the faith which the average citizen has a right to place in the police. The Metropolitan Crime Commission expresses not only great concern, but also great outrage and disgust over this prodigious violation of the public trust. See Appellant's Exhibit 2.

If Deputy Chief Saacks had not come out swinging in response to such charges, many would have taken his silence as an admission of guilt. Antoine Saacks was simply defending his hard - earned reputation as a highly respected and ranking member of NOPD by asserting he had not committed any wrongdoing. See Saacks at p. 31 - 32. Chief Taylor, who saw almost all of Deputy Chief Saacks' appearances, stated that he did not find those appearances to be offensive or defamatory to the police department. Further, Chief Taylor testified that he would not have suspended nor fired Antoine Saacks for making those appearances. See Taylor at p. 73 - 74. Also see Deputy Chief Rodriguez at p. 48.

Appellant cites other mitigating factors in his memorandum that were brought out at the hearing in this case, which the Hearing Examiner does not need to repeat. Even assuming a violation of Rule 6 was proven in this case, Appellant correctly notes that the penalty for such a violation is minimal. Chief Taylor testified that he would only "speak" to someone who violated the rule. See Taylor at p. 73 and Vappie at p. 99. Marlon Defilo of the Public Information Office stated that he did not know of anyone who was fired for speaking to the press. See Defilo at p. 315. In light of the

totality of the circumstances of this case the Hearing Examiner would not find a violation of this charge. If Chief Orticke was offended by Antoine Saacks' reference to the OMI investigation as a "farce", and similar such statements, then possibly a one day suspension could be justified. Such a punishment is worth risking in order to maintain the right to defend one's name.

VII. UNTRUTHFULNESS/FALSE OR INACCURATE REPORT

Counsel for the Department of Police in his Post - Trial Memorandum attempts to expand the charges against Deputy Chief Saacks to include violations of Rule 2.3 Untruthfulness and Rule 6.2 False or Inaccurate Report. These were charges alleged by OMI that clearly were not sustained by Chief Orticke. See City Exh. 1 and Orticke at p. 58. There is no basis for accusing Deputy Chief Saacks of untruthfulness relative to his securing permission from former Chief Taylor to work in the video poker/gaming industry. As stated earlier Chief Taylor should have come forward immediately and acknowledged his signature on the Paid Detail/Outside Employment Form, and possibly this case would not have evolved as it has. Chief Taylor had no problem recognizing his signature at the hearing, so he should not have had a problem when OMI showed it to him in the first place.

Further, counsel for the City claims Antoine Saacks was untruthful at the hearing regarding allegations of a relationship between Ms. Sandra Parkman and Chief Orticke. Mr. Saacks' testimony regarding this issue was substantiated by Sgt. Larry Lombas, a retired 27 year veteran of NOPD. Sgt. Lombas was a very credible witness. Chief Orticke and Ms. Parkman denied knowing each other. Chief Orticke was a very good, credible witness for the City when it was his turn to testify. The Hearing Examiner has already stated that Antoine Saacks was a very credible witness in his own behalf, whose testimony was substantiated by many ether excellent witnesses. Ms. Parkman was upset over being brought into

this matter, and the Hearing Officer did state that he was sorry she felt that way. However, she is a convicted felon with a lengthy rap sheet. She could be upset and still be lying. The Hearing Examiner cannot resolve this conflict in the testimony, nor is it necessary to do so. The allegations of untruthfulness against Mr. Saacks cannot be maintained.

CONCLUSION

The genesis of this case was the jealousy and hatred of Anthony Radosti for Antoine Saacks. Mr. Radosti used his position with the Metropolitan Crime Commission not to further good government, but to attempt to ruin Deputy Chief Saacks. As Antoine Saacks noted in his original press release in November 1993, Mr. Radosti had already filed 3 other complaints against Deputy Chief Saacks during his career. Mr. Radosti had vowed to get Mr. Saacks. The MCC should not have allowed itself to be the instrument of vengeance, instead of an arm of good government.

Former Chief Arnesta Taylor, confronted with an MCC and OMI investigation of Antoine Saacks' activities in the video poker business, got cold feet and denied signing Deputy Chief Saacks' Outside Employment Form. Unwilling to take the heat of public scrutiny for allowing Saacks to pursue his video poker interests, Chief Taylor retreated behind his G.O. 387, telling OMI he would not allow a police officer to participate in this type of gambling activity.

Mayor Barthelemy and his administration decided to jump on the MCC bandwagon and dump Chief Saacks. Chief Orticke was ordered to suspend Deputy Chief Saacks for the alleged forgery of the Outside Employment Form. OMI refused to have Chief Taylor's signature on the form analyzed by a competent handwriting expert, although Deputy Chief Saacks was imploring then to do so.

Instead of confining its investigation to the MCC complaint, OMI, NOPD and the administration decided to conduct a massive investigation of all of Mr. Saacks' business dealings in an effort to discredit him. OMI conducted an

otherwise illegal administrative search of not only Antoine Saacks' office, but also the office of his partner in Police Security Detail, Inc., Lt. L.J. Canal. Neither Deputy Chief Saacks nor Lt. Canal were notified by OMI or NOPD of the search and given an opportunity to be present. OMI made no effort to get its Consent To Search Form signed. Had OMI, NOPD and the administration conducted a good faith investigation of the MCC complaint, it would have learned that Antoine Saacks had done nothing illegal. OMI and the administration knew as early as November 15, 1993, from Anthony Radosti himself that Mr. Saacks' video poker dealings involved prominent attorney Ralph Capitelli and Judge Terry Alarcon, both of whom are highly respected members of the legal community. By November 16, 1993, Mr. Saacks was actively cooperating with OMI and the administration in an effort to clear his name. Mr. Saacks explained his friendship with Frank Caracci's son Mark Caracci, a well respected attorney, and immediately provided copies of the Outside Employment Form former Chief Taylor signed.

OMI's laundry list of charges against Deputy Chief Saacks was designed to have the cumulative effect of justifying discharge. Many of the charges were weak, technical charges at best, and were not borne out by the evidence at the hearing. With regard to the more serious charge of theft, OMI investigators did not even interview the alleged victims, i.e. the movie production companies. OMI itself concluded that the alleged actions of Lt. Canal insulates Deputy Chief Saacks regarding the charge of theft and misuse of department property. Yet OMI pressed forward with these charges. Likewise during its investigation OMI did not interview any officials from United Gaming, Inc.

Deputy Chief Saacks' discharge was improper and his appeal to the Civil Service Commission should be upheld. The Hearing Examiner strongly recommends that Deputy Chief Saacks be reinstated to his rank of Captain with full back pay

and benefits of employment, without any loss of seniority. Antoine Saacks does not have to be restored to the position of Deputy Chief, as Deputy Chiefs serve at the will and pleasure of the Chief.

This has been a long and bitter fight. Counsel for both parties did an admirable job for their clients. However, counsel for the Department of Police cannot make up the facts. The facts are greatly in Antoine Saacks' favor. Consequently the City has fallen far short of meeting its burden of proof justifying discharge, demotion or lengthy suspension. Antoine Saacks is a dynamic, professional police officer, who could help the new Chief and Administration in their war on crime, if given the opportunity.

Respectfully submitted,

April 20, 1995
DATE

/s Michael D. Bewers
MICHAEL D. BEWERS
HEARING EXAMINER

APPENDIX F

ANTOINE SAACKS	*	NEW ORLEANS CITY
	*	CIVIL SERVICE
VERSUS	*	
	*	
DEPARTMENT OF POLICE	*	CASE NO. 4890

REPORT OF THE HEARING EXAMINER

Before the Hearing Examiner is Appellant Antoine Saacks' Motion In Limine seeking to exclude from evidence any and all documents seized from Police Security Detail, Inc. These documents were obtained pursuant to a warrantless search of the Office of Lt. L.J. Canal in police headquarters. Counsel for the New Orleans Police Department (the Department or N.O.P.D.) was provided time to brief this issue. The Hearing Examiner agreed with the Department's argument that an evidentiary hearing must be conducted, before the admissibility of the records could be ruled upon. Both parties agreed that the ultimate issue to be decided by the Hearing Examiner is the appropriateness of extending the exclusionary rule to this civil proceeding, if the documents in question were obtained in violation of the prohibitions of the Fourth Amendment against unreasonable searches and seizures. See United States v. Max Janis, 428 US 433, 49 L Ed 2d 1046, 96 S CT 3021 (1976) and other authorities cited by the parties in their Memorandums.

At the hearing on the Motion In Limine held on December 19, 1994, counsel for the Department raised another "threshold" issue, i.e. does in context of the facts of this case ASOP 48.0 of the N.O.P.D. Operations Manual, Title: Searching Department Property and Monitoring Conversations, make the search and seizure in question a legal Administrative Search. See City Exhibit 31. If the answer to this question is an unqualified yes, then there would be no

need for the Hearing Officer to apply the constitutional ~~balancing test~~ called for in Janis.

ASOP 48.0 provides in pertinent part:

SEARCHES

1. All Department property, including vehicles, lockers, desks and personal property therein, shall be subject to search upon the request of a member acting in a supervisory capacity.

2. Every reasonable effort shall be made to conduct the search in presence of the member responsible for or assigned to that property. When the member is not available, the search shall be conducted in the presence of one [of] the member's supervisors.

After hearing the testimony of Office of Municipal investigation (OMI) Director Peter Munster, former Chief of Police Joseph Orticke, Jr., Internal Affairs Division (IAD) Capt. Henry Aschebrock, IAD Director Major Richard Reeves and OMI Senior Special Agent Byron Woods, who testified on behalf of the Department, and the testimony of Major Ronald Serpas and P.O. Jay Saacks of N.O.P.D., who testified on behalf of Appellant and reviewing the documents admitted into evidence, the Hearing Officer reluctantly concludes that ASOP 48.0 permits the search in the instant case for administrative purposes, including the civil service action which is before the Hearing Examiner. This ruling is based on the following findings of fact and conclusions of law.

By the letter dated November 19, 1993, the Metropolitan Crime Commission of New Orleans, Inc. (MCC), a private agency, made a formal complaint to Superintendent of Police Joseph Orticke Jr. that Assistant Superintendent of Police Antoine Saacks was engaged in "activities of a totally unethical nature and in complete violation of New Orleans Police Department policies and code of conduct for its officers." This lengthy letter

specifically complained about Deputy Chief Saacks' activities in connection with the new video poker industry, his dealings with United Gaming of Las Vegas, Nevada and doing business in Louisiana, as Video Services, Inc., his receipt of $325.000.00 in settlement with United Gaming for services rendered and having a close relationship with a proposed video poker business partner, Frank Caracci, who is a convicted felon. Nowhere does the letter complain about appellant's activities in connection with another of his private businesses called Police Security Detail, Inc. Chief Orticke turned the MCC letter over to Director Peter Munster of OMI to investigate. By Ordinance 9445 dated September 15, 1983, OMI was established within the Chief Administrative Office subject to control and supervision of the CAO. OMI has the responsibility and power to investigate into any alleged misconduct of any City employees. See Appellant 3. Chief Orticke testified that OMI, not IAD, is the appropriate entity to investigate the Chief Deputy.

Apparently Assistant Superintendent Saacks had prior to November 19, 1993, heard that allegations were being leveled against him in connection with "illegal/legal gaming operations," because he wrote to Mr. Munster on November 18, 1993, requesting that these charges be investigated. See Appellant 4. In the next few days following Mr. Saacks' letter to Mr. Munster and MCC's letter to Chief Orticke, this investigation became a media event. MCC held a press conference to make public their charges against Deputy Chief Saacks, and in turn Deputy Chief Saacks issued a News Release denying the allegations of MCC. Within this high profile atmosphere, Chief Orticke testified that he received several telephone calls and heard rumors regarding other activities of Appellant. In particular on November 24 1994, Chief Orticke received an anonymous telephone call in which he was informed that information and records could be found in the N.O.P.D. offices of Chief Deputy Saacks, Lt. L.J. Canal and Major Ronald Serpas regarding their private police detail

businesses. Chief Orticke passed this information on to OMI Director Munster.

Mr. Munster testified that he promptly consulted with Assistant City Attorney Elmer Gibbons and it was decided that an immediate administrative search should be done of these offices as part of OMI's ongoing investigation of Chief Deputy Saacks. One reason given for the urgency to search was that it was the day before Thanksgiving and they feared the records would be lost or removed over the long holiday weekend. Chief Orticke testified that Mr. Munster requested permission to search the three (3) above mentioned offices and that he granted the request. Chief Orticke instructed Capt. Henry Aschebrock and Major Richard Reeves of IAD to accompany the OMI agents as observers.

OMI has a printed Consent To Search Form, with Director Munster's name printed thereon, along with the mayor's name, but no effort was made to obtain Appellant's, Lt. Canal's or Major Serpas' consent to the search. Director Munster testified that he never uses the Consent To Search form, claimed it was not his form, but his predecessor's, and that he would search even if a person being investigated did not consent. The Hearing Examiner was very disturbed by the Director's cavalier attitude toward obtaining consent to search in all situations. At least OMI Senior Special Agent Byron woods testified that he believed the form was supposed to be used when attempting to search a City employee's private residence. However, Director Munster maintained that in this particular case, he relied on Police Department ASOP 48.0, along with Chief Orticke's permission to search, as authority to conduct the search without the parties' consent and without a warrant.

Likewise no effort was made to comply with that part of ASOP 48 which states "every reasonable effort shall be made to conduct the search in the presence of the member responsible for or assigned to that property." Lt. Canal happened to come into headquarters while his office was

being searched. He became upset, requested that the search stop but the OMI agents refused. Major Serpas received an "unofficial tip" that his office was about to be searched, and quickly went to headquarters to investigate. Although his office was searched, he successfully prevented OMI from opening his private safe. Chief Deputy Saacks was suspended from the force at the time and was not notified of the search. His brother, P.O. Jay Saacks, by chance came into headquarters during the search. Jay Saacks became upset over what he considered an illegal search. Major Aschebrock, according to P.O. Saacks, told him to calm down, because it was an illegal search and anything that OMI found would be inadmissible. Capt. Aschebrock is also an attorney, and P.O. Jay Saacks followed his advice to remain calm.

The Department's failure to comply with that portion of ASOP 48.0 dealing with notification makes it difficult for the Hearing Examiner to say unqualifiedly that the searches were authorized legal administrative searches. All the Department's witnesses conceded or their testimony demonstrated that for the purposes of criminal proceedings these were illegal warrantless searches. There was no probable cause to search Chief Deputy Saacks, Lt. Canal's or Major Serpas' office for criminal conduct. Not even the anonymous telephone call Chief Orticke received that day mentioned any wrong doing. There was testimony by Capt. Aschebrock that the OMI agents suspected payroll fraud and were advised that in such a case they should stop their search, secure the offices and get a warrant.

Instead OMI saw this as an opportunity to conduct a fishing expedition to further its investigation of Chief Deputy Saacks. There was little, or no reason, to even believe the information sought had anything to do with video poker, the gaming industry and the complaints lodged by MCC. Consequently OMI, with the Department's cooperation and permission chose to characterize this as an administrative search. If they could uncover evidence of misconduct, OMI

and the Department were willing to forego any criminal penalties and use the evidence strictly to punish Chief Deputy Saacks administratively. The Hearing Examiner finds it offensive that the Chief Deputy, even if temporarily suspended, was not afforded the opportunity to be present when his office is searched without a warrant. Obviously OMI and the Department did not want Appellant or his attorneys present, interfering with their search.

On balance though the Hearing Examiner believes the Department and OMI complied with ASOP 48.0, although minimally, when Chief Orticke instructed Capt. Aschebrock and Major Reeves to be present during the search. These officers can qualify as Lt. Canal's supervisor (really superiors), as required by the second sentence of Paragraph 2 of ASOP 48. This conclusion takes into consideration that this search was conducted not in private offices or residences but in N.O.P.D. offices, and desks and file cabinets belonging to the Department. A city employee, especially members of the police department, can not have as high expectation of privacy as a private citizen. The police department is a para military organization, whose members have extraordinary powers. Members of the police department carry guns and badges and have a strict chain of command. Members are subject to the Department's detailed Operations Manual, where ASOP 48.0 is found. ASOP 48.0 is in the nature of a condition of employment and is necessary to preserve discipline and curb misconduct.

Of course ASOP 48.0 can not supersede the United States Constitution's Fourth Amendment or the Louisiana Constitution's privacy rights. The Hearing Examiner can envision situations where the Department conducts illegal administrative searches, which cannot be saved even by ASOP 48. But such is not the case herein. The totality of the situation gave OMI and the Department sufficient reason to investigate private businesses being conducted by the Chief Deputy out of police headquarters. If Chief Deputy Saacks

and Lt. Canal had wished to keep their business strictly private, they should not have conducted it out of police headquarters. The public's interest in the truth and necessity to investigate and stop police misconduct likewise outweighs Chief Deputy Saacks' privacy interest and the possibility of deterring future unlawful OMI and Department searches of police officers and other city employees. This report and opinion of the Hearing Examiner is not to be construed that the Hearing Examiner believes the evidence sought be excluded will show any misconduct by Appellant. It may or may not.

The Hearing Examiner further finds that Article 1004 of the Louisiana Code of Evidence does not apply, because he does not believe the original documents were lost or destroyed in bad faith. Capt. Aschebrock testified that he returned the originals to Sue Williams, a secretary for Lt. Canal. In absence of any proof that the Department, or OMI, has deliberately lost the originals and deliberately altered copies to falsify evidence against Chief Deputy Saacks, the Hearing Examiner will accept copies of the seized documents in question for the purposes of this administrative hearing

Respectfully submitted,

December 20, 1994
DATE

/s Michael D. Bewers
MICHAEL D. BEWERS
HEARING EXAMINER

APPENDIX G

STATUTORY MATERIALS

United States Constitution

The Fourth Amendment to the United States Constitution provides:

> **Amendment IV. Search and Seizure**
>
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> **Amendment V. ... Due Process of Law...**
>
> No person shall be... deprived of life, liberty, or property, without due process of law....

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> **Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection....**
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Louisiana Constitution of 1974

The Louisiana Constitution, Article I § 2, provides:

§ 2. Due Process of Law

Section 2. No person shall be deprived of life, liberty, or property, except by due process of law.

The Louisiana Constitution, Article I § 5, provides:

§ 5. Right to Privacy

Section 5. Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

The Louisiana Constitution, Article X § 8, provides:

§ 8. Appeals

Section 8. (A) Disciplinary Actions. No person who has gained permanent status in the classified state or city service shall be subjected to disciplinary action except for cause expressed in writing. A classified employee subjected to such disciplinary action shall have the right of appeal to the appropriate commission pursuant to Section 12 of this Part. The burden of proof on appeal, as to the facts, shall be on the appointing authority.

(B) Discrimination. No classified employee shall be discriminated against because of his political or religious beliefs, sex, or race. A classified employee so discriminated against shall have the right of appeal to the appropriate commission pursuant to Section 12 of this Part. The burden of proof on appeal, as to the facts, shall be on the employee.

Louisiana Code of Judicial Conduct

The Louisiana Code of Judicial Conduct, in the Section entitled "Compliance," provides in pertinent part:

Compliance with the Code of Judicial Conduct

All elected judges and anyone, whether or not a lawyer, who is an officer of a court of record performing judicial functions, including an officer such as a judge *ad hoc*, judge *pro tempore*, referee, special master, court commissioner, judicially appointed hearing officer, or magistrate,

and anyone who is a justice of the peace, is a judge for the purpose of this Code. All judges shall comply with this Code.

The Louisiana Code of Judicial Conduct, Canon 2, provides in pertinent part:

> **CANON 2. A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All Activities**
>
> A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. A judge shall not allow family, social, political, or other relationships to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interest of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. ...

The Louisiana Code of Judicial Conduct, Canon 3, provides in pertinent part:

> **CANON 3. A Judge Shall Perform the Duties of Office Impartially and Diligently**
>
> A. Adjudicative Responsibilities.
>
> (1) A judge shall be faithful to the law and maintain professional competence in it. A judge shall be unswayed by partisan interests, public clamor, or fear of criticism.
>
> ***

(4) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, and shall not permit staff, court officials or others subject to the judge's direction and control to do so.

***

(7) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

***

C. Recusation. A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned and shall disqualify himself or herself in a proceeding in which disqualification is required by law or applicable Supreme Court rule. In all other instances, a judge should not recuse himself or herself.

Louisiana Code of Civil Procedure Article 151 provides, in part, that a judge may be recused when he:

(1) Has been employed or consulted as an attorney in the cause, or has been associated with an attorney during the latter's employment in the cause;

* * * * * *

(5) Is biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys to such an extent that he would be unable to conduct fair and impartial proceedings.

Rules and Regulations

Louisiana State Civil Service Rule 13.32 provides:

> The grounds for recusation of a Commissioner shall be the same as the grounds for the recusation of judges of the courts of the State of Louisiana.

New Orleans City Civil Service Rule 4.4 provides in pertinent part:

> RULE 4- PERFORMANCE OF DUTY
> 4. NEGLECT OF DUTY
> a. Each member, because of his grade and assignment, is required to perform certain duties and assume certain responsibilities. A member's failure to properly function in either or both of these areas constitutes a neglect of duty.
> b. A member with supervisory responsibility shall be in neglect of duty whenever he fails to properly supervise subordinates, or when his actions in matters relating to discipline fail to conform with the dictates of Departmental Rules and Regulations.
> c. The following acts or omissions to act, although not exhaustive are considered neglect of duty:
> ***
> 6. Failing to comply with instructions, oral or written, from any authoritative source;...

New Orleans City Civil Service Rule IX, Section 1, paragraph 1.1, provides:

RULE IX
DISCIPLINARY ACTIONS
Section 1. MAINTAINING STANDARDS OF SERVICE

1.1 When an employee in the classified service is unable or unwilling to perform the duties of his/her position in a satisfactory manner, or has committed any act to the prejudice of the service, or has omitted to perform any act it was his/her duty to perform, or otherwise has become subject to corrective action, the appointing authority shall take action warranted by the circumstances to maintain the standards of effective service. The action may include one or more of the following:

(1) removal from the service.

(2) involuntary retirement.

(3) reduction in pay within the salary range for the employee's classification, subject to the provisions of Rule IV, Section 8.

(4) demotion to any position of a lower classification that the employee is deemed by the appointing authority and the Director to be competent to fill, accompanied by a reduction in pay, which is within the salary range for the lower classification, subject to the provisions of Rule IV, Section 8.

(5) suspension without pay not exceeding one hundred twenty (120) calendar days.

(6) fine.

The New Orleans Police Department Operations Manual, ASOP 48, provides in pertinent part:

> 1. All Department property, including vehicles, lockers, desks and personal property therein, shall be subject to search upon the request of a member acting in a supervisory capacity.
>
> 2. Every reasonable effort shall be made to conduct the search in the presence of the member responsible for or assigned to that property. When the member is not available, the search shall be conducted in the presence of one of the member's supervisors.

The New Orleans Police Department Operations Manual, ASOP 85.0, relative to Paid Detail/Outside Employment, provides in pertinent part:

> 4. Members wishing to work any paid details or engage in outside employment shall complete a New Orleans Police Paid Detail/Outside Employment Authorization Form # 121 prior to working the paid detail/outside employment, except under circumstances stipulated in paragraph 13 and 15. Paid Detail/Outside Employment Authorization Forms are available in each unit and the Personnel Division and shall be completed and disseminated as indicated on the form.
>
> 5. Paid details and/or outside employment shall not interfere with the member's performance of duty. While working paid details and/or outside employment, members shall be governed by all departmental policies, rules, procedures, and

orders, and shall enforce all State, Municipal and Federal laws.